National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

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CASES SUMMARIZED
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(R-2534): Donald Gardiner Named Assistant to the Regional Director of NLRB's St. Louis Regional Office

Clarification: In the list of Unpublished Board Decisions and Orders in Representation Cases in the July 9 2004 issue (W-2955), the ruling for *Tyson Foods, Inc.,* Jefferson, WI, 30-UD-165-1,-2, June 30, 2004, should read:

ORDER [granting Union's request for review of Acting Regional Director's Decision and Direction of Election in Case 30-UD-165 and denying individual Petitioner's appeal of Regional Director's determination to treat Case 30-CA-16766-1 as a blocking charge in Case 30-UD-165-2]

Allen Storage and Moving Co., Inc. (7-CA-44395, 44993; 342 NLRB No. 44) Flint, MI July 16, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally canceling whole life insurance policies that the Respondent maintained for unit employees; violated Section 8(a)(1) by threatening to discharge employees if they did not comply with the terms of the Respondent's March 2002 recall notification; and violated Section 8(a)(3) and (1) by locking out employees in September 2001 and March 2002. [HTML] [PDF]

Chairman Battista and Members Schaumber disagreed with the judge's finding that the Respondent violated the Act by failing to provide certain information to Teamsters Local 332, including estimate sheets, local work order invoices, intrastate and interstate bills of lading, and records of work referred to the Respondent by other moving companies. The Union asserted that it needed the information to evaluate the Respondent's claim concerning the diminished availability of work. Chairman Battista and Member Schaumber found that the Respondent met its burden of showing that the information the Union requested was confidential and that the Respondent offered a reasonable alternative to obtain the information, which the Union rejected without discussion or explanation.

Member Walsh agreed that under *Pennsylvania Power & Light Co*., 301 NLRB 1104, 1105-1105 (1991), the Board has held that "when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests." However, he disagreed with the majority's application of law to the facts of this case and, for the reasons stated by the judge, he would find that the Respondent violated the Act by refusing to provide the Union with the requested information.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Teamsters Local 332; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Flint, Aug. 6-8 and Sept. 23-26, 2002. Adm. Law Judge Paul Bogas issued his decision Feb. 14, 2003.

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Brown University (1-RC-21368; 341 NLRB No. 42) Providence, RI July 13, 2004. The Board, in a 3-2 decision involving Brown University, held that graduate student assistants are not employees within the meaning of Section 2(3) of the National Labor Relations Act. The Board found that these persons are students and are not statutory employees.
The majority opinion is signed by Chairman Battista and Members Schaumber and Meisburg. Members Liebman and Walsh dissented. [HTML] [PDF]

The decision overrules the Board's decision four years ago in *New York University*, 332 NLRB 1205 (2000), which found that the graduate student assistants there were employees within the meaning of Section 2(3) of the Act. *NYU* had overruled

over 25 years of precedent under which graduate student assistants had not been regarded as statutory employees. See the 1974 decision in *Leland Stanford Junior University*, 214 NLRB 621. The majority in *Brown* stated:

> After carefully analyzing these issues, we have come to the conclusion that the Board's 25-year pre-*NYU* principle of regarding graduate student assistants as nonemployees was sound and well reasoned. It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university.

The majority pointed out that *Leland Stanford* was "wholly consistent with the overall purpose and aim of the Act." The Act governs "a fundamentally economic relationship between employees and employers."

The Board interpreted Section 2(3) in light of the "underlying fundamental premise of the Act," i.e. that the Act is "designed to cover economic relationships." The majority concluded: "The Board's longstanding rule that it will not assert jurisdiction over relationships that are 'primarily educational' is consistent with these principles."

In reaching its decision in the *Brown University* case, the majority dismissed a representation petition filed by the Auto Workers seeking to represent approximately 450 graduate students employed as teaching assistants, research assistants, and proctors. They reversed a Regional Director's Decision and Direction of Election that had relied on *NYU* in finding that these persons are statutory employees and constitute an appropriate unit for collective bargaining. The election was conducted on December 6, 2001, and the ballots were impounded pending the disposition of the union's request for review. The election is mooted by this decision.

The majority said that there are also policy reasons for declining to extend collective bargaining rights to such persons. There is a danger that the imposition of collective bargaining in this context would intrude upon the academic relationship between the university and students. Further, the majority found that "it simply does not effectuate the national labor policy to accord [such persons] collective bargaining rights because they are primarily students."

The Board majority expressed no opinion regarding the Board's decision in *Boston Medical Center*, 330 NLRB 152 (1999), relied on heavily in the *NYU* decision, in which a Board majority found that interns, residents, and house staff at teaching hospitals were employees within the meaning of Section 2(3) of the Act.

In dissent, Members Liebman and Walsh observed that "collective bargaining by graduate students is increasingly a fact of American university life." They characterized

the majority's decision as "woefully out of touch with contemporary academic reality" and stated:

> The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions.

The dissent pointed to the broad definition of "employee" in the Act, arguing that the Board was not free to create its own exclusion for graduate assistants. According to the dissent, American universities increasingly rely on graduate students to perform important teaching and other work. Denying graduate students labor law rights, the dissent predicted, will lead to increased labor disputes on campus.

(Full Board participated.)

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Sanitation Salvage Corp. (2-CA-35481-1; 342 NLRB No. 41) Bronx, NY July 12, 2004. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign the collective-bargaining agreement presented by Teamsters Local 813 on April 1, and again on May 5, 2003. [HTML] [PDF]

The judge found that Respondent and the Union reached an agreement binding the Respondent to the terms and conditions of a collective-bargaining agreement to be negotiated between the Union and one of the two major companies in the waste disposal industry in New York City. The agreement, commonly referred to as a "me-too" agreement, obligated the Respondent to sign and be bound by the collective-bargaining agreement that would be reached between the Union and employer A or B. The Union thereafter tendered the "A" contract to the Respondent.

The Respondent refused to sign the agreement, arguing that no authorized agent ever signed the me-too agreement on the Respondent's behalf and that the terms of the agreement were so ambiguous as to render it unenforceable. The Board disagreed. It held that the Respondent bound itself to the me-too agreement, which obligated the Respondent to adopt the Union's choice of two collective-bargaining agreements, and that the me-too agreement is sufficiently definite, in light of extrinsic evidence, to constitute an enforceable contract.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 813; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on Oct. 8-9, 2003. Adm. Law Judge Michael A. Rosas issued his decision March 8, 2004.

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Sociedad Española de Auxilio Mutuo y Beneficencia de P.R. a/k/a Hospital Español Auxilio Mutuo de Puerto Rico, Inc. (24-CA-7993, et al.; 342 NLRB No. 40) San Juan, PR July 13, 2004. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by disparately enforcing a no-solicitation/no-distribution policy against its unionized employees, and seeking to have employees decertify the Union; Section 8(a)(3) and (1) by discharging employee Elsa Romero; and Section 8(a)(5) and (1) by subcontracting bargaining unit work. [HTML] [PDF]

Chairman Battista and Member Schaumber, contrary to the judge, did not find that the Respondent violated Section 8(a)(3) and (1) by locking out unit employees from December 22-31, 1998, as a reprisal against the Union and did not independently violate Section 8(a)(1) by telling employees that it was locking them out in retaliation for their union activities. The majority rejected the judge's conclusion that the Respondent failed to present evidence of legitimate and substantial business justifications for locking out its employees. The Respondent claimed that its decision to call a lockout, and subsequently to advance it was a necessary response to the instability caused by the Union calling two strikes during the critical holiday period. It argued that the judge's rejection of its asserted business justification demonstrated his misunderstanding of the relevant employment market in Puerto Rico. The majority also rejected the judge's alternative finding that the General Counsel had proved animus against protected union activity.

In her partial dissent, Member Liebman contended that the evidence clearly supports the judge's finding that the Respondent locked out its employees to punish the Union for calling a lawful strike. She stated that the Respondent never proved that it would have had difficulty in finding replacement workers during the Union's two planned strikes and that, even if the Respondent had met its burden, the judge correctly found that the lockout was motivated by antiunion animus, not business justifications. Member Liebman noted that she would also find that the Respondent unlawfully solicited signatures for a decertification petition.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Unidad Laboral de Enfermeras(os) y Empleados de La Salud; complaint alleged violation of Section 8(a)(1), (3) and (5). Hearing at Hato Rey, Oct. 10-13 and 24-26, 2000. Adm. Law Judge George Alemán issued his decision Nov. 30, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork (New York District Council of Carpenters) Staten Island, NY July 12, 2004. 29-CA-25899, 29-RC-10093; JD(NY)-31-04, Judge Steven Davis.

Ogihara America Corp. (Auto Workers) Detroit, MI July 12, 2004. 7-CA-47071, 7-RC-22589; JD(ATL)-37-04, Judge George Carson II.

C & F Foods, Inc. (Steelworkers Local 7686) Saint Louis, MO July 13, 2004. 14-CA-27640; JD-45-04, Judge Paul Buxbaum.

New England Regional Council of Carpenters (Village Construction Co. Inc.) Salem, MA July 15, 2004. 1-CC-2712; JD(NY)-32-04, Judge Raymond P. Green.

Jeffrey Taylor, an Individual d/b/a Ogden Valley Drywall (Southwest Regional Council of Carpenters) Las Vegas, NV July 13, 2004. 28-CA-18803, et al.; JD(SF)-54-04, Judge Lana H. Parke.

Chipper Express, Inc. (Teamsters Locals 179, 330, and 673) Chicago, IL July 16, 2004. 13-CA-41555; JD-68-04, Judge William G. Kocol.

Gala Bus Lines, Ltd. and Safetyline Transit, Inc., Alter Egos (Teamsters Local 854) Brooklyn, NY July 16, 2004. 29-CA-25864; JD(NY)-33-04, Judge Steven Fish.

Terry's Lincoln Mercury, Inc. d/b/a Terry's Body Shop-Collision Center (Machinists Local 701) Frankfort, IL July 16, 2004. 13-CA-40863; JD-69-04, Judge Martin J. Linsky.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(***In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)***

DECISION AND CERTIFICATION OF REPRESENTATIVE

Silver Line Building Products, Corporation, Lansing, IL, 13-RC-21151, July 12, 2004
Children's Hospital and Health Center, San Diego, CA, 21-RC-20707, July 15, 2004

DECISION AND DIRECTION OF SECOND ELECTION

Shoppers World, LLC, North Bergen, NJ, 22-RC-12418, July 13, 2004

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Auto Truck Transport Corp., Garland and Laredo, TX; 16-RC-10551, July 15, 2004
Owensboro Medical Health System, Owensboro, KY, 25-RC-10217, et al., July 15, 2004

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

ALJUD Licensed Home Care Services, Brooklyn, NY, 29-RC-10183, July 15, 2004
Alpha Industries, Alton, IL, 14-RC-12507, July 15, 2004
Duane Reade, Inc., New York, NY, 2-RC-22498, July 15, 2004

Miscellaneous Board Orders

ORDER[remanding proceeding to the Regional Director for further consideration consistent with *Brown University*, 342 NLRB No. 42 (2004)]

Research Foundation of the State University of New York, Buffalo, NY, 3-RC-11313, July 16, 2004
Research Foundation of the State University of New York, Albany, NY, 3-RC-11184, July 16, 2004
Research Foundation of the State University of New York, Syracuse, NY, 3-RC-11410, July 16, 2004
Trustees of Columbia University in the City of New York, New York, NY, 2-RC-22358, July 16, 2004
Tufts University, Medford, MA, 1-RC-21452, July 16, 2004
University of Pennsylvania, Philadelphia, PA, 4-RC-20353, July 16, 2004

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